122 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Alliance Pipeline L.P. Docket No. RP00-445-021

ORDER DENYING REHEARING

(Issued March 20, 2008)

1. This order denies PPM Energy, Inc.'s (PPM) request for rehearing of the Commission's December 31, 2007 letter order accepting tariff sheets filed by Alliance Pipeline L.P. (Alliance) reflecting changes made to the rates charged under its negotiated rate agreements as the result of changes in Alliance's costs.

Background

2. On November 30, 2007, Alliance filed revised tariff sheets to update its list of negotiated rate contracts set forth in its tariff. Alliance provides firm transportation under Rate Schedule FT-1 for its existing shippers, all of which have agreed to pay negotiated rates. The negotiated rate agreements provide that changes in Alliance's costs will be reflected in its negotiated rates from time to time. Alliance's revised tariff sheets reflected an increase in the negotiated rate under Rate Schedule FT-1 from $15.4864 Dth per month to $16.3914 Dth per month. Alliance requested that the tariff sheets become effective January 1, 2008.

3. PPM filed a protest to Alliance's filing requesting that the Commission either summarily reject the filing as unsupported or suspend the tariff sheets for five months and initiate a hearing to review the costs underlying the proposed increased rates. PPM argued that Alliance was under a contractual obligation to submit to the Commission certain proposed cost revisions for review under section 4 of the Natural Gas Act (NGA). PPM also argued that the rate principles on which the rate adjustments were based were not stated with sufficient specificity to permit the Commission to evaluate whether the resulting rates were just and reasonable (i.e., they were not known and determinable).

4. On December 31, 2007, the Commission issued a letter order accepting Alliance's revised tariff sheets to become effective January 1, 2008, as proposed. The Commission found that Alliance and its Rate Schedule FT-1 shippers entered into negotiated rate agreements with full understanding of the fact that Alliance may adjust the negotiated rates periodically to reflect changes in costs. The Commission also found that although Alliance proposed that certain cost adjustments would be subject to Commission approval, such provisions were not accepted by the Commission. The Commission concluded that Alliance's filing to adjust its negotiated rates complied with Alliance's negotiated rate authority and the Commission's policy on negotiated rates.

5. On January 30, 2008, PPM filed a request for rehearing of the December 31, 2007 Order. PPM requests that the Commission (1) grant rehearing in this proceeding, (2) reverse the December 31, 2007 Order, and (3) reject Alliance's November 30, 2007 filing as patently deficient, or suspend the November 30, 2007 filing for five months and establish an evidentiary hearing in which Alliance shall be required to justify the costs underlying its proposed changes to shippers' negotiated rates. The details of PPM's request for rehearing are discussed below.

6. Alliance's negotiated rates were first approved in its certificate proceeding in Docket No. CP97-168-000, *et al*.[1] While Alliance's *pro forma* tariff sheets did indicate that the negotiated rates would be subject to Commission approval pursuant to the Natural Gas Act (NGA), those tariff sheets were not accepted by the Commission and did not go into effect.[2] No party sought rehearing on this issue.[3]

Discussion

7. On rehearing, PPM continues to argue, as it did in its protest, that the mutual intent of the parties to the negotiated rate agreements was to reflect certain of Alliance's actual costs in shippers' negotiated rates only after the costs were approved by the Commission

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[1] *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 (1997).

[2] *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 at 61,599 (1997).

[3] *Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 (1998). It also should be noted that in response to a rehearing request from Alliance's competitor, Natural Gas Pipeline Company of America, the Commission denied a request to offer a new open season to shippers to choose between negotiated and recourse rates. The Commission stated "Alliance's shippers, however, do not assert that the Commission's recomputation of Alliance's maximum recourse rate prejudiced their elections or that they now wish to reconsider their elections as negotiated shippers in a new open season. Lacking any record evidence of inequity or unfairness to negotiated shippers, Natural's request for a new open season is denied." Id. at 62,214.

under section 4 of the NGA. PPM bases its argument on *pro forma* tariff sheets contained in Alliance's certificate application seeking negotiated rate authority which stated "[t]he Negotiated Rates are determined using actual operating costs and maintenance costs, gross plant, and debt costs approved by the FERC from time to time. Changes in these elements shall be reflected in Transporter's Negotiated Rates and must be approved by the FERC from time to time pursuant to the Natural Gas Act." However, as the Commission stated in the December 31, 2007, these tariff sheets were never accepted by the Commission and were never part of Alliance's tariff. As the certificate order stated, "Alliance's *pro forma* tariff describes the formula Alliance will use to calculate the negotiated rates. Since Alliance intends to state its negotiated rates in its tariff, there is no need to include the formula it will use to calculate its negotiated rates. Alliance must remove the negotiated rate formula and the related depreciation schedule from its tariff. These items are more appropriately included in the service agreements."[4] Thus, PPM's argument rests on tariff sheets that had no legal effect.

8. The various documents that are legally operative in this proceeding show that Alliance's negotiated rates were not subject to section 4 review by the Commission. The open season precedent agreement required shippers to make a choice between negotiated rates and recourse rates. The negotiated rate option stated that "[c]onsistent with the FERC's Negotiated Rate policy, Shippers electing Negotiated Rates agree to pay such rates without regard to any action or determination of the FERC with respect to the proposed cost-based recourse rates."[5] In contrast, the recourse rate option states that "[s]hippers electing recourse rates agree to pay such rates, subject to changes determined by the FERC from time to time. Recourse rates will be cost-based rates filed with and approved by the FERC, pursuant to the Natural Gas Act or successor legislation."[6] The negotiated rate option also stated "[c]hanges in Transporter's operating costs will be reflected in rates from time to time, for the primary term and any extension of the primary term of the Transportation Agreement."[7] The various rate principles included in the precedent agreements, such as the preceding one on operating costs, were reflected in the FT service agreements signed by all negotiated rate shippers, including PPM's predecessors in interest.[8] Even Alliance's negotiated rate tariff sheets state that "[t]he

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[4] *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 at 61,599 (1997).

[5] See Exhibit 2 of PPM's Protest, Open Season Precedent Agreement Schedule C.

[6] *Id.*

[7] *Id.*

[8] It should be noted that while PPM argues about the intent and understanding of the parties, referring to documents from 1997, it was not an original shipper on Alliance and was only recently assigned negotiated rate contracts in 2005 through 2007.

stated Reservation Charge is derived from rate principles stipulated in the Firm Transportation Agreement."[9]

9. Contrary to PPM's argument, the fact that the Commission is not reviewing Alliance's negotiated rates is not an abdication of its section 4 responsibilities. The Commission's actions here are consistent with the Commission's negotiated rate policy and cases decided thereunder. The Commission stated that it would entertain proposals for negotiated rates where customers were able to choose service under a cost-of-service based tariff.[10] Such is the case here where all shippers were given the option of choosing a negotiated rate or a recourse rate. The Commission indicated that it did "not intend to suspend the effectiveness of negotiated rate filings or impose a refund obligation for those rates."[11] The Commission also stated that it did "not intend to review a pipeline's negotiated rates at the time filed."[12] The Commission stated that issues of allocation of costs between negotiated rates and recourse rates and potential cross-subsidization would be addressed in a section 4 rate case, and that allegations that the pipeline was acting in an unduly discriminatory manner toward similarly situated shippers seeking negotiated rates could be raised in a section 5 complaint at any time. No such issues have been raised here requiring Commission review. Moreover, in response to arguments that negotiated rates may result in rate forms contrary to Commission policy, the Commission has stated that

> [T]he Commission simply does not review the rate design of a negotiated rate. If a customer is willing to accept a rate design or rate form that the Commission would not impose on recourse customers as a group, that does not mean that under negotiated rates an individual customer cannot agree to it. However, in so agreeing, these negotiated rate customers also remove themselves from any protection the Commission may give customers under recourse rates.[13]

10. PPM contends that the Commission's December 31, 2007 Order erred by failing to address the legal precedent requiring a negotiated rate to be known and determinable.

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[9] *See*, Seventh Revised Sheet No. 14 at footnote 5.

[10] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines***,** 74 FERC ¶ 61,076 at 61,241 (1996).

[11] *Id.*

[12] *Id.* at 61,242.

[13] *Columbia Gulf Transmission Company,* 78 FERC ¶ 61,263 at 62,124 (1997).

PPM argues that the rate principles do not satisfy this requirement.[14] The Commission finds that PPM misstates the finding of the *NorAm* case it cited. In that case, the Commission rejected NorAm's "effective unit rate" approach because the actual, specific negotiated rates were unknown and undeterminable. The Commission required NorAm to either state the actual negotiated rate for each shipper in its tariff or, alternatively, state the rate formula with sufficient specificity to permit easy calculation of the rate. Here, there is no need to be able to easily calculate the rate using a formula because Alliance has stated the actual negotiated rates on the revised tariff sheets. The difference between the two approaches is that when a pipeline states the actual negotiated rate it must file new tariff sheets each time the rate changes while a tariff sheet containing a negotiated rate formula need not be changed as along as the formula does not change. In either case, the section 4 requirement that rates be on file with the Commission is satisfied.

11. PPM argues that even if the negotiated rate formula had been abandoned, the negotiated rate principles are silent on the procedure for implementing changes in Alliance's operating costs. Therefore, PPM argues since the contract is silent or ambiguous, the Commission must look at evidence outside the contract to resolve the ambiguity. PPM then refers to the certificate application claiming that the parties and Alliance expected the costs underlying any changes in the negotiated rate level to be approved by the Commission under section 4 of the NGA. The Commission finds that there is no need to examine extrinsic evidence simply because the firm transportation agreement states that"[c]hanges in Transporter's operating costs will be reflected in its rates from time to time."[15] This language was in the open season precedent agreement where shippers chose between the negotiated rate option and the recourse rate option, and then was memorialized in the firm transportation agreements for negotiated rates. In addition, as Alliance stated at page 8 of its December 17, 2007 answer to PPM's protest, "[t]he establishment of Alliance's negotiated rates in any given year involves a reconciliation of the costs incurred in the calendar year two years prior to that given year, a reforecast of the costs for the immediately preceding calendar year, and an estimate of the following calendar year's costs. This iterative process assures that only Alliance's actual operating costs are ultimately reflected in its negotiated rates . . . . To the extent the 2008 forecast of any cost element differs from actual experience, it will be reforecast in 2009 and reconciled in 2010."

12. Moreover, the idea of a section 4 rate review is inconsistent with the findings in the Commission's certificate order. There the Commission said:

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[14] *Citing, NorAm Gas Transmission Co.*, 75 FERC ¶ 61,091, *order rejecting in part compliance filing, NorAm Gas Transmission Co.,* 75 FERC ¶ 61,322 (1996) (*NorAm)*.

[15] Section 3 of Alliance's FT Service Agreement and Appendix B, Item 12 of the FT Service Agreement.

> The alternative rate policy statement states that the Commission would dispense with cost of service regulation for an individual shipper when mutually agreed upon by the pipeline and shipper. The Commission stated that it would permit negotiated rates within the guidelines established in the policy statement. There is no evidence that any shipper was coerced to choose Alliance's negotiated rate option. Thus, we are not reviewing the level of Alliance's proposed negotiated rates nor the method by which they were calculated.[16]

If, as PPM argues, the intent of the Alliance and its shippers was to have the negotiated rates subject to Commission review pursuant to section 4, that principle could have been incorporated in the open season precedent agreement or the subsequent firm transportation agreement. No shippers alleged that either Alliance's open season precedent agreement or the firm transportation agreement was either ambiguous or not an expression of the parties' mutual intent. In addition, Alliance and its shippers have operated under this so-called "ambiguous" agreement for several years. In fact, revised negotiated rates have been approved by the Commission effective January 1 of every year from 2002-2007.

13. PPM contends that the December 31, 2007 Order is unlawful under judicial precedent establishing the standard of review for a tariff filing pursuant to a rate formula under section 4 of the NGA. PPM asserts that when a pipeline files a revised tariff sheet to restate the rate derivation in its tariff pursuant to a rate formula, the pipeline has the burden of demonstrating that "the costs to be collected were prudently incurred and the [rate] was calculated correctly. . . ."[17] The Commission finds that the PPM is incorrect when stating that Alliance's negotiated rates are calculated according to a rate formula. As discussed above, with respect to negotiated rates, a pipeline can either state the actual negotiated rate or calculate it according to a rate formula. Although the firm transportation agreements state that "the rate charged for transportation service under the Firm Transportation Agreement will be established in accordance with the Rate Principles outlined in Appendix B," that does not constitute a rate formula and Alliance has chosen the option of stating its actual negotiated rates each time they are changed. Moreover, the *ChevronTexaco* case cited by PPM is inapplicable. In that proceeding, ANR Pipeline Company (ANR) filed to increase its cashout surcharge pursuant to a methodology contained in its tariff. The Commission accepted ANR's filing to institute the rate increase but also determined that the methodology used to calculate the surcharge was no longer yielding just and reasonable results and, therefore, instituted section 5

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[16] *Alliance Pipeline L.P.,* 80 FERC ¶ 61,149 at 61,597 (1997).

[17] *Citing, ChevronTexaco Expl. & Prod. Co. v. FERC,* 387 F.3d at 896 (*ChevronTexaco).*

action. A number of parties challenged the Commission's decision to allow the rate increase to go into effect. The court affirmed the Commission's decision finding:

> When it initially approved the rate rule for ANR's cashout surcharge, the agency determined that it would produce just and reasonable results. Thereafter, the Commission properly reviewed the pipeline's surcharge filing only for compliance with the rate rule in its tariff; if the costs to be collected were prudently incurred and the surcharge was calculated correctly, then the pipeline's § 4 filing was properly deemed just and reasonable.[18]

The *ChevronTexaco* case does not support PPM's argument. It simply stands for the proposition that the Commission was required to approve ANR's rate increase pursuant to its existing methodology if certain conditions were met even if the Commission ultimately found the methodology to be unjust and unreasonable.

14. PPM asserts that the Commission's December 31, 2007 Order abdicates the Commission's section 4 responsibilities and has freed Alliance from the strictures of section 4. PPM asserts that the recourse rate is no protection if a rate agreement can lawfully grant a pipeline an ongoing ability to change rates freely without any scrutiny under section 4. PPM contends that the December 31, 2007 Order has gone beyond negotiated rates and market-based rates and has instituted "pipeline controlled" rates. The Commission finds that PPM's argument that the Commission has allowed "pipeline controlled" rates is incorrect. PPM's argument evinces a basic misunderstanding of the Commission's negotiated rate policies. The Commission described a negotiated rate regime in the Alternative Ratemaking Policy Statement as follows:

> [T]he Commission would dispense with cost-of-service regulation for an individual shipper when mutually agreed upon by the pipeline and a shipper and permit negotiated rates and terms and conditions of service that could vary from the pipeline's otherwise applicable tariff. A recourse service that is on file in the pipeline's tariff would always be available for those shippers preferring traditional cost-of-service rates and services.[19]

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[18] *ChevronTexaco,* 387 F.3d at 896.

[19] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines***,** 74 FERC ¶ 61,076 at 61,239 (1996). While the Commission did not ultimately permit negotiated terms and conditions, the quote accurately describes the negotiated rate policy that was approved.

While PPM was not an original shipper on Alliance, all of PPM's predecessors in interest had the opportunity to choose between negotiated rates or recourse rates that were subject to traditional cost-of service regulation, and thus were adequately protected from the pipeline's exercise of market power. No shipper in the past has protested Alliance's negotiated rates, argued that the contract was ambiguous, or that Alliance was not fulfilling its obligations under the negotiated rate contracts. As Alliance has pointed out, for the past seven years "[t]he Commission had accepted the Alliance negotiated rates without any supporting documentation and had never required Alliance to provide additional information."[20] Moreover, the idea that Alliance has the ability to charge excessive rates with unfettered discretion was rebutted in Alliance's December 17, 2007 answer to PPM's original protest. Alliance stated that "[t]he Rate Principles effectively constrain Alliance's current negotiated rates to the cost of service elements identified therein and regularly recurring, post-audit procedures guarantee that cost estimates, however, imprecise when made, will ultimately be reconciled with actual cost experience."[21]

15. PPM's negotiated rates are exactly what they purport to be: they are negotiated between shipper and customer. While a shipper under cost-of-service rates would certainly be entitled to cost-of-service review before the Commission, a shipper selecting negotiated rates is entitled to only what that shipper has negotiated. As successor in interest, PPM is thus entitled to only the rights that its predecessor had when it negotiated its rates with Alliance. As the Commission stated in its December 31, 2007 letter order, "[i]f PPM Energy continues to object to the revised negotiated rates, it should follow the procedures set forth in Alliance's tariff. If this does not resolve the issues raised by PPM Energy, it may then consider whether to file a complaint pursuant to section 5 of the NGA."[22] Thus, PPM Energy has a number of remedial procedures it may pursue.

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[20] Alliance's December 17, 2007 answer to PPM's protest at 12.

[21] *Id.* at 9. . PPM has not offered evidence that prior rate increases were excessive or "pipeline controlled." In its first negotiated rate filing following the 2000 in-service date of the pipeline, Alliance's negotiated rates were reduced effective January 1, 2002. "For the years 2003-2007, the annual increase in negotiated rates averaged 2.5 percent, and the proposed increase for 2008 over 2007 rates is less than 6 percent" Alliance's December 17, 2007 Answer at 3, fn. 3.

[22] Alliance Pipeline, L.P., 121 FERC ¶ 61,309 at P 9 (2007). In its December 17, 2007 answer to PPM's protest, Alliance recognized that while PPM could file a section 5 complaint, it had not used either the informal complaint procedures under Section 31 of Alliance's tariff or the Section 25 arbitration procedures concerning good faith billing disputes.

Finally, PPM argues that the Commission erred by not rejecting Alliance's filing as not in compliance with the Part 154 filing requirements or, at the very least, suspending the rates and establishing a hearing. The Commission rejects PPM's argument because, as the Commission has already stated elsewhere in this order, negotiated rates are not subject to same filing requirements or afforded the same protections as traditional cost of service rates. PPM has not raised any arguments which convince the Commission that the December 31, 2007 Order was in error. Accordingly, PPM's request for rehearing is denied.

The Commission orders:

PPM's January 30, 2008 request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.